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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC JACKSON, Defendant and Appellant.	B210542 (Los Angeles County Super. Ct. No. LA05870)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alice E. Altoon, Judge. Affirmed.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Eric Jackson, appeals the judgment entered following his conviction, by jury trial, for two counts of robbery and two counts of assault with a firearm, with firearm, great bodily injury, prior prison term and prior serious felony conviction findings (Pen. Code, §§ 211, 245, 12022.5, 12022.53, 12022.7, 667.5, 667, subd. (a)-(i)).[1] Jackson was sentenced to state prison for a term of 73 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On October 11, 2007, Dana Witt, owner of Dana Kathryn Jewelry in Studio City, was at her store. Her 17-year-old son, Aaron Kowan, who also worked at the store, was there with her. Defendant Jackson and a woman rang the store's front door bell. Witt buzzed them in and showed them some jewelry.

Suddenly, Jackson pulled out a gun and pointed it at Witt. He grabbed her arm and they struggled. Witt fell to the floor, crawled over to the panic button, and pushed it. Jackson came around the counter and hit Witt in the head with the gun. Witt lost consciousness and woke up in the hospital.

During the assault on Witt, Kowan came around the counter and Jackson pointed the gun at him. Jackson told him to get on the ground and Kowan complied. Kowan saw Jackson stomp on Witt several times. Jackson smashed the front of the jewelry case with his gun, stuck his hand in, and grabbed some jewelry. He and the woman fled. According to the prosecution's sentencing memorandum, Jackson stole more than $100,000 worth of jewelry.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Witt suffered a fractured cheek and jaw, as well as other injuries. A surveillance video of the robbery was shown to the jury. Both Witt and Kowan identified Jackson from a photo array and then at trial.

Blood and pieces of skin were found on the broken glass of the jewelry case. There was also blood on the glass front door of the jewelry store.

Michael Mastrocovo, a criminalist with the Los Angeles Police Department, analyzed DNA found in the blood and skin recovered at the crime scene. He testified the resulting DNA profile matched a DNA profile obtained from an oral swab the trial court required Jackson to provide.

2. *Defense case.*

The defense did not put on any witnesses. Through cross-examination, defense counsel tried to impeach the prosecution case by suggesting there were technical problems with the DNA evidence, and that the eyewitness identifications were tainted because the victims had watched the surveillance video.

CONTENTION

Jackson is entitled to a new trial because the trial court failed to cure the prosecution's discovery violation.

DISCUSSION

Jackson contends the trial court failed to cure a discovery violation which occurred when the prosecution did not timely inform the defense that DNA recovered from the crime scene matched a sample of his DNA obtained in connection with a prior conviction. This claim is meritless.

1. *Factual background.*

The DNA evidence recovered from the jewelry store was ultimately matched up to two different samples of Jackson's DNA: one sample was derived from an oral swab taken by court order a few months before the trial in this case, and the other was a DNA

sample Jackson had been required to give in connection with a prior conviction (hereafter, "prior conviction DNA sample").[2]

Jackson's prior conviction DNA sample had been stored in the CODIS system database. "The Combined DNA Index System (CODIS) was developed by the Federal Bureau of Investigation as a national database containing deoxyribonucleic acid profiles of convicted felons." (*People v. Smith* (2003) 107 Cal.App.4th 646, 656.) "To ensure expeditious and economical processing of offender specimens and samples for inclusion in the FBI's CODIS System and the state's DNA Database and Data Bank Program, the Department of Justice DNA Laboratory is authorized to contract with other laboratories, whether public or private, including law enforcement laboratories, that have the capability of fully analyzing offender specimens or samples within 60 days of receipt, for the anonymous analysis of specimens and samples for forensic identification testing as provided in this chapter and in accordance with the quality assurance requirement established by CODIS and ASCLD/LAB." (§ 298.3, subd. (a).)

In the period leading up to Jackson's trial, defense counsel asked the prosecutor if any matches had been found between the crime scene DNA and any of the DNA samples stored in CODIS. Defense counsel was repeatedly told no results had yet been obtained from CODIS. On July 18, 2008,[3] while jury voir dire was proceeding, defense counsel moved to suppress all of the DNA evidence, arguing Jackson should not have been compelled to give the oral swab because his DNA was already in the CODIS database. Defense counsel also complained the DNA evidence obtained from the crime scene had not been uploaded to CODIS until April 29. The trial court deferred ruling on Jackson's motion.

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[2] It is not clear from the record exactly when the prior conviction DNA sample was acquired. Two different dates are mentioned: 2002 and 2006.

[3] All further calendar references are to the year 2008 unless otherwise specified.

On July 22, the attorneys made opening statements to the jury. The prosecutor said Jackson would be identified as the perpetrator in three different ways: eyewitness identification by the victims, the surveillance video, and the DNA he left behind when he smashed the glass case and cut his hand. Defense counsel, in turn, argued this evidence would be shown to lack credibility. The victims had not been focusing on the perpetrator during the robbery and their recollections had been tainted by watching the surveillance videotape. The quality of the surveillance videotape was too poor to allow identification of the perpetrator beyond a reasonable doubt.

As for the DNA evidence, defense counsel argued that although a complete profile of the crime scene DNA sample had been derived by mid-January, it had not yet been checked against CODIS: "There is a database. The database is called CODIS . . . and I think all of you have heard about it. It's a database that is filled with D.N.A. profiles of all kinds of people. For three months there was no upload to CODIS from this D.N.A. profile. In other words, nobody took the D.N.A. profile that they garnered . . . from the blood swab [i.e., the crime scene evidence] and uploaded it into CODIS to find out who did this crime. It wasn't until after Mr. Jackson was court ordered to provide a D.N.A. swab in February that they actually were able to make a match, and yet still no match on CODIS. [¶] And you will find out . . . that CODIS not only will identify cold hits from crime scenes of perpetrators, but it also can be used as a cross-check to make sure your analysis is correct. But yet on April 29th, when the upload was made, there was no match. There was no cross-check, there was no result."

On July 23, the prosecution advised defense counsel the CODIS results had finally arrived and that no match had been found between the crime scene DNA and any DNA in CODIS.

On July 24, however, Michael Mastrocovo, the police serologist, told the prosecutor and defense counsel he had just received a telephone message from a CODIS administrator saying a CODIS match had in fact been found between the crime scene DNA sample and Jackson's prior conviction DNA sample. Defense counsel objected to admitting evidence of this match and asked for discovery sanctions, arguing he had been

relying on the fact there were no CODIS results, then suddenly yesterday he was informed there had been a negative result, and now he was being told that result had actually been positive.

The prosecutor argued the People had no intention of putting the CODIS match into evidence because they were going to rely solely on the match between the court-ordered oral swab DNA and the crime scene D.N.A. The trial court pointed out there was no *Brady*[4] problem because the CODIS match was inculpatory, not exculpatory, evidence. However, when the prosecutor asserted the People were not to blame for the late discovery, the trial court said: "If you had done an adequate investigation, we [would have] had this information, we wouldn't be sitting here going round and round on this right now. [Defense counsel] wouldn't have made the opening statement that he made, and he wouldn't have put everybody in the position that they're in now."

Nevertheless, the trial court refused to grant a mistrial. As a discovery sanction, defense counsel asked if he could say during closing argument there had still not been a CODIS match. The trial court refused because that would not be a true statement: "The accurate statement that you could make is . . . that at the time you [i.e., the jurors] were selected, I was not informed of any results, and that is factual and that is what happened."

During closing argument, defense counsel told the jury: "At the time I addressed you when we started this trial in my opening statement, there was no result from CODIS."

2. *Discussion.*

Jackson contends the trial court erred because the discovery sanction, i.e., letting defense counsel clarify his opening statement references to the CODIS match results, was insufficient to cure the discovery violation: "Since defense counsel's strategy was

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[4] *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194], requires the prosecution to make available to the defense all exculpatory evidence.

affected and he could not undo his opening statement, the only effective sanction was declaring a mistrial and allowing defense counsel to start over with accurate information." We disagree.

Citing *People v. Brophy* (1992) 5 Cal.App.4th 932, Jackson argues "dismissal of charges is proper as a sanction for the prosecution's refusing to comply with a discovery order, when the effect of the refusal is to deny the defendant's right to due process."

But in *Brophy* the defendant's motion to suppress evidence leading to his arrest on drug charges had been effectively sabotaged when the United States Postal Service refused to turn over records of its investigation. *Brophy* reversed the defendant's conviction and ordered a new suppression hearing: "[W]hat happened here was fundamentally unfair. The postal service possessed all the information about the Omaha search of the package. Defendant has the burden of proving that the search was illegal, but he was told, in effect, that he failed to meet that burden because the postal service asserted privilege as to all those facts known only to it. In this instance by failing to enforce its discovery order against the federal officials or in some manner to sanction the prosecution for the failure of the postal service to comply with that order, the trial court placed defendant in the untenable position of requiring him to prove the nonexistence of a search warrant, but denying him the only means of showing there was no warrant. Because defendant's discovery order was neither enforced nor complied with he was unable to meet his evidentiary burden of showing there had been an unlawful search." (*People v. Brophy, supra,* 5 Cal.App.4th at pp. 937-938.)

Comparing himself to the defendant in *Brophy*, Jackson argues he "was entitled to believe the accuracy of the information given him, and was led to form a trial strategy based on a falsity. He told the jury in his opening statement that *there was no match* between the swab from the robbery and a sample of appellant's DNA, and that CODIS could be used as a cross-check to make sure that the DNA profile from the crime scene matched appellant's DNA profile. After finding out there was a match, the court allowed him merely to tell the jury in closing argument that at the time he addressed them in his opening statement there *was* no result. This rendered the trial unfair. He could not undo

his opening statement, yet he could not follow through on its promise, as he was denied the benefits of his initial strategy challenging the accuracy of the prosecution's DNA results. He was unable to show there was no cross-check to those results. *Had he known there was a cold hit, he most certainly would not have told the jury in opening statement there wasn't one*. . . . [¶] The discovery violation thus resulted in an ambush that was a violation of due process." (Italics added.)

However, the record shows there was no ambush. Jackson's current interpretation of what trial counsel told the jury at opening statement is contradicted both by the opening statement itself and by trial counsel's own interpretation at the time.

We agree with the Attorney General's assertion that "the trial court repeatedly found, and defense counsel even conceded, the prosecution did not state to defense counsel that there was not a match . . . . The prosecutor repeatedly told the court and defense counsel merely that she had not received any information regarding that match." In fact, Jackson's appeal brief is predicated upon a serial misreading of the record. For example, he asserts: "On July 18, 2008 . . . the prosecutor . . . informed defense counsel that the DNA recovered at the crime scene did not match anyone currently in the CODIS database." But the record shows Jackson was told only that no CODIS results had yet been received, not that it had been determined the crime scene DNA did not match anyone in CODIS.

The reporter's transcript demonstrates it was not until *after* defense counsel delivered his opening statement that he was informed there had been a CODIS result.

The record shows the prosecutor kept insisting the only thing she told defense counsel prior to opening statements was that she was still waiting for the CODIS results. On July 23, the prosecutor said: "I've stated multiple times to [defense counsel] on the record that there has been no match so far, and I've said that repeatedly." On July 24, the prosecutor said: "I want to note one more time that I made it very clear to counsel that we didn't have a CODIS match yet, all the way up until we realized that we had one yesterday afternoon. . . . Maybe one time I said there has been no CODIS matches.

But [defense counsel] knew beforehand that what I meant was there has been no CODIS matches that we know of to this date."

The prosecutor's assertions were corroborated by defense counsel's own statements, which make it clear he did not believe there had been any CODIS results when he gave his opening statement, and that he intended to tell the jury only this and nothing more.

Opening statements were given on July 22. Later that day, defense counsel said: "Just for the record, a couple of days ago I asked counsel for the communication logs in relation to the D.N.A. expert, Mr. Mastrocovo . . . . And also I asked for whether or not there were any CODIS match results from the documentation. I noted that there was an upload . . . to CODIS on April 29, '08 and *I was informed that to date there is* [sic] *no results from that upload,* so I have been relying on that. *I relied on that in my opening statement* and I will continue to rely on that until I am further noticed." (Italics added.)

On the morning of July 23, defense counsel said: "[B]efore we started opening arguments, I told the court that I relied on the information I was given, that . . . it was still being uploaded or there was some reason why *it wasn't done yet, or there was still no result.* [¶] So if you recall, *in my opening statement, I told the jurors that even though there was an upload on April 29th, we still have no results* . . . ." (Italics added.)

On the afternoon of July 23, defense counsel said: "My information that I had at the time of my opening statement was there was no result. And I said even to this day they have no result, okay? That's what I told [the jury]. I'm not saying there is no match. Do you know the difference between match, no match, and result, or ongoing still? Because their whole thing was they still don't have a result. 'We don't have a result.' Then . . . after I have made my presentation to the jury, now they have a result."

Hence, the record shows that, if there was a discovery violation, it certainly did not result in the kind of prejudice claimed by Jackson on appeal. Defense counsel merely told the jury there had not yet been any CODIS results even though Jackson's prior conviction DNA sample was already in CODIS. This implied at most that the authorities were dragging their feet in doing an available cross-check; it did not imply the cross-check had already been done and had resulted in exculpatory evidence. The trial court's discovery sanction was, therefore, proper and sufficient in the circumstances.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.